Supreme Court, U.S.
FILED
JUL 14 1995
CLERK

No. 94-1781

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ATTORNEY R,

Petitioner

v.

THE MISSISSIPPI BAR,

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

AMENDED APPENDIX

R. Charles Robb,
Petitioner Pro Se
Post Office Box 10793
#5 Twelve Oaks Circle
Jackson, MS 39209-0793
(601) 922-1111

July 14, 1995

BEST AVAILABLE COPY

25

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

RICHARD B. SCHWARTZ, LANCE L. STEVENS, ANDY STEWART, MARK W. DAVIS, GUICE & GUICE, INC., RICHARD SACKETT EXECUTIVE CONSULTANTS, INC., MISSISSIPPI ASSOCIATION OF BROADCASTERS, AND PUBLIC CITIZEN, INC.

PLAINTIFFS

VS. **CIVIL ACTION NO. 3:94-CV-569BN**

W. SCOTT WELCH, III, PRESIDENT, THE MISSISSIPPI BAR; L.F. SAMS, JR., FIRST VICE PRESIDENT AND PRESIDENT-ELECT, THE MISSISSIPPI BAR; PAULA A. GRAVES, SECOND VICE PRESIDENT, THE MISSISSIPPI BAR; BILLIE J. GRAHAM, CHAIRMAN, COMMITTEE ON PROFESSIONAL RESPONSIBILITY, THE MISSISSIPPI BAR; DONALD C. DORNAN, JR., BENJAMIN E. GRIFFITH, AVA N. JACKSON, JOHN G. JONES, AND T. CALVIN WELLS, MEMBERS OF THE COMPLAINTS COMMITTEE, THE MISSISSIPPI BAR

DEFENDANTS

RULING OF THE COURT

I. INTRODUCTION

The Court has conducted a bench trial of this matter and has considered the testimony, the other evidence presented into the record, the briefs and closing arguments of counsel.

The Court enters its opinion by way of these findings of fact and conclusions of law.

This is a declaratory judgment action, wherein Plaintiffs, under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, challenge the constitutionality of certain of the Amendments to Rule 7, Information About Legal Services, Mississippi Rules of Professional Conduct ("the new Rules"), as promulgated by the Supreme Court of Mississippi on June 22, 1994. The new Rules restrict lawyer advertising in various ways, and Defendants in this action have enforcement authority over those Rules. Plaintiffs are four attorneys, licensed and actively engaged in the practice of law in Mississippi,[1] two advertising and public relations corporations, both authorized to do and doing business in Mississippi ("the advertising agency Plaintiffs"),[2] the Mississippi Association of Broadcasters ("MAB," or "the media plaintiffs"),[3] and Public Citizen, Inc. ("Public Citizen"), a consumer advocacy organization.[4] Defendants are W. Scott Welch, III, President of The Mississippi Bar, L.F. Sams, Jr.,

---

[1] These attorneys are Richard B. Schwartz, Lance L. Stevens, Andy Stewart and Mark W. Davis.

[2] These firms are Guice & Guice, Inc., based in Biloxi, Mississippi, and Richard Sackett Executive Consultants, Inc., based in New Orleans, Louisiana. Both firms have assisted one or more of the lawyer plaintiffs in preparing television advertisements that have been telecast in Mississippi.

[3] MAB is comprised of some fifteen Mississippi-based television stations and 120 Mississippi-based radio stations, many of which have broadcast advertisements by the lawyer plaintiffs.

[4] Public Citizen claims a nationwide membership of over 140,000, "approximately 462 of whom reside in Mississippi and are persons who in the past have been, at present are, and some of whom will in the future be in the market in Mississippi for competent legal services . . . ." Compl. at 5.

President-Elect of The Mississippi Bar, Paula Graves, Second Vice President of The Mississippi Bar, and the Chairman and members of the Committee on Professional Responsibility, formerly known as the Complaints Committee, of The Mississippi Bar.[5] Each of the Defendants is sued in his official capacity. Each of the lawyer Plaintiffs claims he has been forced to restrict or discontinue one or more of the advertisements he has used in the past or wishes to use now, or risk prosecution and discipline by Defendants. The advertising agency Plaintiffs contend that, because the new Rules prohibit or restrict certain advertising techniques, they are hindered in their ability to propose and prepare advertisements for the lawyer Plaintiffs who comply with the new Rules. They also claim they will suffer a loss of income, due to reduction in volume of broadcast advertising as a direct result of the new Rules. MAB also claims its members will lose income because the new Rules will decrease the volume of broadcast advertising by lawyers. Public Citizen claims the new Rules will deprive its members and all Mississippians of information regarding the availability and price of legal services.

A. Procedural Background

Plaintiffs commenced this action on September 21, 1994. On October 13, 1994, they filed a Motion for Preliminary Injunction, and on November 14, 1994, this Court entered a Consent Order advancing the case on its docket for trial on the merits in lieu of hearing the Motion for Preliminary Injunction and providing for a moratorium on enforcement of the

---

[5] The Chairman of the Committee is Billie J. Graham. Members of the Committee are Donald C. Dornan, Jr., Benjamin E. Griffith, Ava N. Jackson, John G. Jones, and T. Calvin Wells.

new Rules with two exceptions. The Order provided that the disclosures required by Rules 7.2(d)[6] and 7.6[7] would remain in full force and effect. This Court conducted a bench trial of this matter from February 27 through March 2, 1995.

B. The Challenged Rules[8]

Plaintiffs challenge the new Rules 7.1, 7.2 and 7.6, as follows:

(1) The mandatory disclosure requirement of Rule 7.2(d) for all lawyer advertisements, which requires use of these words:

The Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements.

(2) The mandate of Rule 7.6(a) that any advertisement suggesting an area of practice include the following statement:

Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein.

(3) The mandatory disclosure requirement of Rule 7.2(l), which states:

All advertisements and written communications provided for under these Rules shall disclose the geographic location,

---

[6] Rule 7.2(d) requires that all broadcast advertisements state "The Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements."

[7] Rule 7.6 provides that, if the advertisement communicates that a lawyer practices in a particular field, it must state that "Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein."

[8] Although the Court will discuss each of the Rules in the body of this Opinion and Order, it attaches as Appendix A both the challenged Rules and the Comments thereto.

by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed.

(4) The disclosure required by Rule 7.2(h) which states:

Every advertisement and written communication that contains information about the lawyer's fee, including those which indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.

(5) The disclosure required by Rule 7.1(a), "as authoritatively interpreted through Official Comments,"[9] that prohibits an advertisement for a law firm which states that all of the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the same claim.

(6) The disclosure required by Rule 7.2(b) providing that, if the single voice otherwise allowed in an advertisement by Rule 7.2(b) is not that of an attorney affiliated with the firm or a full time employee of the firm, there shall be prominently displayed at the beginning and end of said advertisement either orally or in writing, a notice to the public in the following form: "Actor portrayal" and/or "Paid Endorsement."

Plaintiffs challenge the new Rules individually, but also request that the Court strike them down collectively, arguing that Defendants cannot prove that the new Rules, individually or as a group, are a justified, constitutional restriction of Plaintiffs' commercial speech rights.

---

[9] The Court addresses the effect of the guidance provided by the Comments elsewhere in its Opinion.

II. CONCLUSIONS OF LAW

A. Standing of Advertising, Media and Consumer Plaintiffs

Defendants challenge the standing to bring this action of the advertising firm Plaintiffs, the media Plaintiffs, and the consumer Plaintiffs. They do not challenge the standing of the lawyer Plaintiffs. The Court holds that each of these groups, through pleadings and evidence presented at trial, have proven they are proper plaintiffs in this lawsuit. While the Court recognizes it is "under an independent obligation to examine [its] own jurisdiction," FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) (citing Allen v. Wright, 468 U.S. 737, 750 (1984)), and that standing may not be "inferred argumentatively from averments in the pleadings," id. (citing Grace v. American Central Ins. Co., 109 U.S. 278, 284 (1883)), the Court finds that Plaintiffs have presented evidence of particularized injury sufficient to support standing to sue in this case. See id. (stating that evidence of standing "must affirmatively appear in the record") (citing Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884)).

The United States Supreme Court has written that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). That value to consumers, and the specific allegations of injury of the Plaintiff members of Public Citizen, Inc., is sufficient to provide standing to the consumer Plaintiffs. As to the advertising agency and media Plaintiffs, the Court holds that they, too, have standing to bring this suit.

The Supreme Court addressed the issue of advertiser

standing in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), wherein the advertiser plaintiffs challenged the validity of a municipal ordinance prohibiting certain outdoor advertising displays. Plaintiffs brought suit to enjoin enforcement of the ordinance. In resolving the standing issue in favor of the plaintiffs, the Court wrote:

> [W]e have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers -- often those with the highest interest and the largest stake in a First Amendment controversy -- would not be able to challenge government limitations on speech as substantially overbroad.

Metromedia, 453 U.S. at 504 n.11. The Court then applied the four-part test from Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-566 (1980)[10] for determining validity of government restrictions on commercial speech, id. at 507, and held that the ordinance was invalid under the First Amendment. Id. at 521. Although Metromedia involved advertising plaintiffs, this Court holds

---

[10] The Central Hudson four-part test for determining the validity of government restrictions on commercial speech is as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Central Hudson, 447 U.S. at 563-66, construed in Metromedia, 453 U.S. at 507.

that the reasoning of the Court in that case applies to media Plaintiffs, as well as the advertising agency Plaintiffs, in the case at bar.

Pursuant to the requirements laid out by the Fifth Circuit in Finch v. Mississippi State Medical Ass'n, Inc., 585 F.2d 765 (5th Cir. 1978), all the Plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Finch, 585 F.2d at 771 (citations omitted). Accordingly, the Court holds that all Plaintiffs have standing sufficient to bring this lawsuit.

B. Applicable Legal Standard

The Supreme Court has held that lawyer advertising is commercial expression to which protections of the First Amendment apply, and Defendants do not claim otherwise. See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). The question before the Court in this case, then, is whether the new Rules unconstitutionally ban speech that is not false, deceptive, or misleading, or restrict such speech without "a showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy, 114 S. Ct. 2084, 2085 (1994).

Defendants claim the central dispute in this case is whether Plaintiffs' challenge to the new Rules is a "facial challenge" or an "as applied" challenge. Defendants claim that since no Plaintiffs are being prosecuted for a violation of any of the

new Rules, this action presents a facial challenge, and Plaintiffs therefore have the burden to show that no set of circumstances exist under which the rules would be valid. Defs.' Proposed Conc. of Law, ¶ 1. Although the distinction between the two standards is important,[11] the Court has little difficulty concluding that this case involves an "as applied" challenge to the new rules, and that the rules therefore should be scrutinized under the Central Hudson test for constitutionality. The Court finds that Defendants take an overly narrow view of what must occur for state regulations to be "applied" to Plaintiffs. Defendants essentially argue that, unless and until the State takes steps to enforce its regulations, Plaintiffs may not mount an "as applied" attack, and are limited instead to a facial challenge. This contention is not supported by Supreme Court rulings on commercial speech rights.

The Court finds that Plaintiffs here are in the precise legal posture as the plaintiff Scott Fane ("Fane") in the recent case of Edenfield v. Fane, 113 S. Ct. 1792 (1993). In Edenfield, Fane sought declaratory and injunctive relief barring enforcement of Florida rules prohibiting in-person solicitation by certified public accountants, on the ground that the rules violated the First Amendment. Though the state had taken no enforcement action against Fane, he alleged "that but for the

---

[11] Depending upon how the challenge is construed, it dramatically shifts the burdens of proof of the parties. Defendants argue that "the Plaintiffs have the burden of showing that the challenged rules can never be effective in limiting misleading or deceptive lawyer advertising or potentially misleading or deceptive lawyer advertising." Defs.' Proposed Concl. of Law, ¶ 1. Plaintiffs argue that since the new advertising rules "directly and immediately impact them adversely," Defendants carry the burden of justifying the new regulations under the applicable First Amendment commercial speech legal standard.

prohibition he would seek clients through personal solicitation and would offer fees below prevailing rates." Fane, 113 S. Ct. at 1797. In its decision the Court wrote:

> It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, n.20, 103 S. Ct. 2875, 2883, n. 20, 77 L. Ed. 2d 469(1983); Fox, 492 U.S. at 480, 109 S. Ct. at 3035. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree [additional citations omitted].

Id. at 1800. Just as in Metromedia, the Court went on to apply the Central Hudson test, reserved, as the Defendants claim, for those cases involving "as applied" challenges.

Although Defendants are correct that all lawyer advertising cases heretofore have reached the high court on appeal from impositions of sanctions, this Court does not find this legal coincidence dispositive. Each of the lawyer advertising cases that has reached the Supreme Court has been viewed by the Court as an "as applied" case, and in each case the Court applied the Central Hudson test. Metromedia, Inc. v. San Diego, though not a lawyer advertising case, involved the same legal considerations as the lawyer advertising cases and as the present case. In that case, as discussed above, no enforcement actions had been instituted against plaintiff outdoor advertisers, yet the Supreme Court applied the Central Hudson test.

Finally, the Court is persuaded by Plaintiffs' argument

that, were they not able to bring an action for declaratory and injunctive relief before proceedings were instituted against a particular lawyer Plaintiff, they effectively would be deprived of a federal forum to hear their case, short of appeal from the Mississippi Supreme Court to the United States Supreme Court. If Defendants were correct that the only way to obtain "as applied" review is to await an enforcement action, then, since federalism principles would require the federal court to abstain during the pendency of such enforcement proceeding, see, e.g., Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 436-37 (1982); Younger v. Harris, 401 U.S. 37 (1971), Plaintiffs' declaratory and injunctive claims under 42 U.S.C. §1983 could not be pursued in federal court. Defendants' contention simply is not consistent with current law. Defendants have pointed the Court to no commercial speech case in which the Central Hudson test was not applied, and the Court holds that that test should apply in this case.[12]

C. Application of Commercial Speech Analysis[13]

---

[12] The United States Court of Appeals for the Eleventh Circuit came to the same conclusion when, quite recently, it was presented with the same question. See Jacobs v. Florida Bar, No. 93-2933, 1995 WL 125883 (11th Cir. Apr. 10, 1995) (holding, in challenge to Florida lawyer advertising rules, where no enforcement action had yet been taken, that district court should have placed burden of proof on the Florida Bar, using "as applied" model). See also Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94 CV 61, slip op. at 38 (E.D. Tex. Mar. 31, 1995) (holding that "Defendants carry the burden of vindicating the amended rules").

[13] The Court draws its legal analytical structure for this section from the recent Supreme Court opinion in Ibanez, 114 S. Ct. at 2088-89. The United States Court of Appeals for the Eleventh Circuit came to the same conclusion when, quite recently, it was presented with the same question. See Jacobs v. Florida

Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," Peel, 496 U.S. at 108 (1990), only false, deceptive, or misleading commercial speech may be banned. Ibanez, 114 S. Ct. 2084, 2088 (citing Zauderer, 471 U.S. at 638. Stated another way, "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment . . . . Misleading advertising may be prohibited entirely." In re R.M.J., 455 U.S. 191, 203 (1982), cited in Ibanez, 114 S. Ct. at 2088.

Although commercial speech that is not false, deceptive, or misleading may not be banned, it may be restricted. Central Hudson, 447 U.S. at 566. However, the State may only restrict such commercial speech if it shows that the restriction directly and materially advances a substantial state interest in a manner that is no more extensive than necessary to serve that interest. Id. The State regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose," id. at 564, and the regulation must advance a substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served." Edenfield, 113 S. Ct. at 1798.

The State Defendants in this case essentially placed all their eggs in the basket of their contention that the Court should analyze Plaintiffs' claim under a facial challenge model. Defendants all but conceded at closing arguments that

---

Bar, No. 93-2933, 1995 WL 125883 (11th Cir. Apr. 10, 1995) (holding, in challenge to Florida lawyer advertising rules, where no enforcement action had yet been taken, that district court should have placed burden of proof on the Florida Bar, using "as applied" model). See also Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94 CV 61, slip op. at 38 (E.D. Tex. Mar. 31, 1995) (holding that "Defendants carry the burden of vindicating the amended rules").

they came to Court to prove no more than that there were conceivable circumstances under which the new Rules could be constitutional, and if they lost the battle on the burden of proof, then they were not prepared to fight the remainder of the war. The Court, having ruled that Plaintiffs' "as applied" model is the correct one in this case, is left largely to test the new Rules under the Central Hudson test, under evidence presented chiefly by the Plaintiffs.

D. Summary of Testimony

1. Plaintiffs' Case-in-Chief

Plaintiffs' first attorney witness was Richard Schwartz, a practicing attorney in Mississippi since 1981. He has advertised since 1989, using television advertisements, the Yellow Pages, and billboards. Though he was offered free sixty second radio spots, and had advertisements prepared by an ad agency, he claims the required disclaimers made the ads ineffective, so he did not take advantage of the free air time. He stated that he uses the Sackett advertising agency, the president of which, Richard Sackett, testified later at trial. Schwartz objected to all of the new Rules, and would use each of the prohibited techniques if they were permitted.

Andy Stewart, a practicing attorney since 1990, testified that he has been advertising since May 1992, using the Yellow Pages, newspapers, a few television ads, and the "Consumer Tips" telephone dial ads. Stewart also objected to all the new Rules. He explained that the Consumer Tips ads run thirty seconds, and that the required disclaimers took eight to twelve seconds of that time. He stated that, prior to the use of disclaimers he was receiving 34 to 36 direct connects to his officer per month, and after the disclaimers were required, he received 28 to 29.

Mark Davis, who has been practicing law since 1984, has advertised since July 1989, using television, the Yellow Pages, and the newspaper. He also objected to all the rules, explaining that he has used most of the techniques banned by the new Rules, and would use them in the future if permitted. Davis uses the Guice ad agency, the second of the two advertising corporation Plaintiffs in this case.

The final of the four lawyer Plaintiffs is Lance Stevens, a practicing attorney since 1988. He has been advertising for three and a half years, using television ads produced by R.W. Lynch Company for nation-wide use, tailored to the local lawyer. He testified that he has used several of the techniques banned by the new Rules, and would use them again if permitted.

Reed Guice, president and chief operating officer of Guice & Guice, Inc. advertising agency in Biloxi, Mississippi, testified that he handles advertising for Davis and Goldberg. He stated that, from an advertising perspective, he saw no reason to approach lawyer advertising any differently from other service advertising. Guice went through each of the new Rules, and gave reasons why each detracted from either the effect of the advertisements that he could produce, or eliminated altogether proven, effective, advertising techniques.

Richard Sackett, chief executive officer and chairman of the board of Richard Sackett Executive Consultants of New Orleans, Louisiana, represents Richard Schwartz as his advertising agent. He claims his agency is one of the few large ad agencies handling mostly lawyer advertising. Sackett explained how he has changed Schwartz' advertisements to conform to the "spirit of the new Rules," but claimed that he did not know if it would be possible to conform to the letter of

those Rules. He argued that any ad in strict conformance would be so cluttered with disclosures as to be ineffective. He took issue particularly with the ban on the use of testimonials, noting that testimonials are one of the basic methods of advertising, and a method easy to regulate. Either customers or bar regulators would need only to go to the person offering the testimonial to confirm its truth. Sackett also explained how each of the rules impinged on basic advertising methods, commonly used for advertisements in other service areas.

Charles Wolfram, a law professor from Cornell University who teaches in the field of professional responsibility, and a reporter for the American Law Institute committee writing Restatement of Law Governing Lawyers, gave a brief history of lawyer advertising. He noted that Abraham Lincoln advertised, and that advertising by lawyers was common until the end of the Nineteenth Century, when the notion developed within the profession that advertising made lawyers look like businessmen or tradesmen. He claimed that the profession first used peer pressure to regulate advertising, then restrictive rules until Bates in 1977.

Professor Wolfram also noted the bad image lawyers have always had, stating that at no time in recorded history had lawyers been viewed positively. He attributed this negative image to the kind of work that lawyers do, and to the human foibles of the lawyers themselves, rather than to lawyer advertising. He stated that there are no studies which indicate any correlation between lawyer advertising and the poor public image of lawyers.

Professor Wolfram took issue with each of the new Rules at issue in this case. He stated that the rules, as a group, are more restrictive than those of all but a very few states,

and far more restrictive than Bates requires. He testified that most states use the ABA Model Rules, which simply prohibit false, deceptive and misleading advertising. Professor Wolfram also pointed out some deficiencies in the individual rules. As to the prohibition against testimonials and dramatizations, he stated that he could not define what the Mississippi Bar meant by "testimonials," and in any case could find no problem with the use of either testimonials or dramatizations, so long as they were true. He questioned the prohibition against "self-laudatory" advertisements, noting that advertising is self-laudatory by its very nature, emphasizing as it does the qualities of the goods or services advertised. He also attacked the use of disclosures, claiming they tend to make viewers of the advertisement distrust the message, the lawyer generating that message, and the legal profession itself.

Keith Murray, a marketing professor from Bryant College in Smithfield, Rhode Island, explained basic marketing principles to the Court. He stated that the basic concept underlying service marketing is providing the kinds of information consumers want to hear. If the potential message is retarded by overly-restrictive rules, then consumers are not able to receive the information they need. Professor Murray also took issue with most of the rules from a marketing standpoint, and criticized some of the studies relied upon by the Defendants in formulating the new Rules.

Marcelene Johnson, a "practice development coordinator" from Chicago, and past president of the National Law Firm Marketing Association, testified about her marketing work for four large, Chicago area law firms. She has developed bro chures and other advertising programs, but has done no television advertising. She is a public member of the ABA Com-

mission on Advertising, which developed "Awards for Dignity," a system for rewarding advertisements deemed "dignified." The Commission solicited nominees through flyers mailed to law firms and Johnson noted that in both 1992 and 1993, the Commission received over 150 submissions for the awards.

Johnson also helped prepare the "Crossroads" report on lawyer advertising. She described the series of hearings, surveys, and wide spectrum of views and interests that went into the preparation of the report, which was presented at the 1994 mid-year meeting of the ABA. She testified that the report concluded that there was no evidence that disclosures or disclaimers protected the image of the legal profession. In fact, the Commission found that restrictive disclosures and disclaimers were detrimental to the image of the profession. She also testified that the Commission found no evidence of problems resulting from the use of testimonials, self-laudatory statements, assurances of quality, dramatizations, more than one voice, background sounds, or slogans. The Commission concluded that the public was used to advertising in all its forms, and was not misled by common advertising techniques. It should be noted that the report has not been adopted by the House of Delegates.

Stuart Kellogg, General manager of Jackson television station WAPT channel 16 and member of the Mississippi Association of Broadcasters, testified that his station has carried lawyer advertising since the early 1960s. He noted that such ads have always been subject to Federal Trade Commission ("FTC") rules and regulations prohibiting false and misleading advertising. He also testified that testimonials are one of the most effective tools available to advertisers, and that banning them decreases the effectiveness of the advertisements, and

hereby lessens the revenue of his station and of other stations who are members of the Mississippi Association of Broadcasters.

The Court also received into evidence the deposition of Dan Modisett, president elect of the Mississippi Association of Broadcasters, past president of Jackson Broadcasters, and past president of Greater Jackson Advertising. His testimony was similar to Kellogg's, as he noted the difficulties in creating effective thirty second television or radio advertisements, given the restrictions of the new Rules. He stated that the interests of the media Plaintiffs in this case is two-fold, including loss of potential advertisements, and reduction in First Amendment rights to broadcast information to viewers. He also noted that all lawyer advertising, like other advertising, is subject to FTC regulations restricting false or misleading advertising, and that his station had never received any complaints from the FTC about lawyer advertising.

Finally, the Court heard from Evans Harrington, a retired English professor and member of Public Citizen, Inc. He stated that he had seen lawyer advertisements in Oxford, Mississippi, and that a reduction in lawyer advertising would personally affect him, as he found the ads he had seen to be instructive about the law and about lawyers themselves.

2. Defendants' Case-in-Chief

Defendants offered two witnesses. Professor Richard Mizerski, professor of marketing at Florida State University, testified that lawyer advertising is different from other forms of service advertising because (1) it is difficult for non-lawyers to evaluate the performance of lawyers; (2) legal "business" has more risk than other forms of personal service because money and emotions are often involved; (3) the search for

lawyers by individuals tends to be a limited one, since people often stay with the first lawyer they visit; and (4) people are hesitant to terminate the services of lawyers. His testimony on the new Rules was consistent with Defendants' "facial challenge" defense theory. He stated that the practices barred by each of the new Rules could be misleading under some circumstances. He stated that the use of performance results and background voices "could be misleading," that the use of more than one voice "could conceivably be misleading," that the use of slogans "can be misleading," and that the use of celebrity voices was a "potentially misleading device." On cross examination he admitted that he could "conceive of ads that are not deceptive," containing each of the proscribed practices. He also stated that the FTC permits each of the banned advertising techniques.

The second and final defense witness was W. Scott Welch, III, President of the Mississippi Bar Association. He explained the involvement of the State Bar in lawyer advertising, including the appointment of a task force to study advertising, the holding of hearings statewide, the initial proposal of rules and subsequent modification in response to objections from advertising attorneys, and the final adoption of the new Rules by the Mississippi Supreme Court. He explained the specific concerns which the Bar had over the possible misleading or deceptive effect of each of the techniques proscribed by the Rules, and, like Professor Mizerski, noted that all the banned techniques could mislead the public. He also disagreed with testimony by several of Plaintiff's witnesses that advertisements do not affect the image of attorneys in the eyes of the public.

III. HOLDING OF THE COURT

A. Defendants Did Not Carry Their Burden of Proof

The Plaintiffs challenged the new Rules individually and in toto, and the Defendants had the heavy burden of vindicating those rules under the Central Hudson standard. To withstand constitutional scrutiny, Defendants had to establish that each of the challenged new Rules directly advances a stated (and substantial) governmental interest, and is no broader than reasonably necessary to serve that interest. See Edenfield, 113S. Ct. at 1800. Stated differently, Defendants had a constitutionally imposed burden to develop a record demonstrating that each of the new Rules, and that the Rules in the aggregate, passed muster under the First Amendment. Defendants, however, ignored their burden in their case-in-chief, believing the onus was on Plaintiffs to prove the new Rules are unconstitutional.

In pre-trial briefs and in closing arguments, Defendants admitted that the Court was hearing "dual" cases, one tried by Plaintiffs under the "as applied" analysis, and one by Defendants under the "facial challenge" analysis. The Defendants gambled their entire case on the legal assumption that they only needed to prove that the new Rules could, conceivably, be applied in a constitutional manner. The Plaintiffs, on the other hand, placed evidence before the Court that the new Rules do not necessarily restrict false, misleading or deceptive advertising, and that they do not directly advance the governmental interest claimed. That evidence went unrebutted.

Having ruled that the Plaintiffs proceeded under the prop-

er legal standard, see supra pp. 8-11, the Court finds itself in the awkward position of ruling that, though certain of the challenged rules could conceivably meet the Central Hudson test for constitutionality, no such evidence was placed before the Court by the Defendants. The Defendants' insistence on trying their case under the facial model therefore compels the Court to hold that the challenged rules, as a total package, violate the Plaintiff's First Amendment rights to engage in commercial speech.

B. Plaintiffs' Relief

1. Declaratory Relief

Title 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, authorize entry of declaratory and injunctive relief necessary to bring state agencies or officials into compliance with the Constitution. A declaratory judgment is generally considered a less intrusive form of relief than an injunction, Steffel v. Thompson, 415 U.S. 452, 469 (1974), and "[w]here . . . constitutional violations are found, but state officials have shown their readiness to meet constitutional requirements, the Court should limit its initial response to a grant of declaratory relief." Morrow v. Harwell, 768 F.2d 619, 627 (5th Cir. 1985); Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94-CV-61, slip op. at 99 (E.D. Tex. Mar. 31, 1995). In Texans Against Censorship, having found that only two of several challenged rules governing lawyer advertising were unconstitutional, the Court wrote, "In the instant action, there is no indication that defendants will fail to recognize and protect plaintiffs' constitutional rights as determined by this court, or that defendants will ignore the adjudication rendered herein. Accordingly, injunctive relief is not necessary and only declaratory relief shall be granted." Texans

Against Censorship, No. 3:94-CV-61, slip op. at 99-100.

Because "injunctive decrees directing state officials are appropriate only when constitutional violations have been shown and when the state officials are demonstrably unlikely to implement the required changes without its [sic] spur," Morrow, 768 F.2d at 627, this Court finds that a declaration that the new Rules are unenforceable should be sufficient to protect Plaintiffs' First Amendment rights. The Court draws support for its conclusion from its review of the Consent Order providing for a moratorium on enforcement of the new Rules with two exceptions, and on the compliance with that order by the Defendants in this case.

2. Attorney's Fees and Costs

Title 42 U.S.C. §1988 provides that, in §1983 actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." 42 U.S.C. §1988(b). The Fifth Circuit has ordered an award of attorney's fees in a civil rights suit alleging violations of First Amendment rights. Universal Amusement Co., Inc. v. Vance, 587 F.2d 159, 172-73 (5th Cir. 1978). The Court finds that Plaintiffs, as prevailing parties, are entitled to recover attorney's fees reasonably incurred as a result of this lawsuit. Though the parties have not briefed this issue, and the Court welcomes such briefing by both parties upon submission of fees by Plaintiffs in accordance with Uniform Local Rule 15, the Court believes whatever fees as are awarded should be assessed against the State. See, e.g., Scott v. Flowers, 910 F.2d 201, 213 n.25 (5th Cir. 1990) (holding, in lawsuit against Texas Commission on Judicial Conduct, that award of attorney's fees must be paid by the state and not assessed against defendants in individual capacity, as the "injunctive

relief sought and won . . . can be obtained from the defendants only in their official capacity as commissioners."); Echols v. Parker, 909 F.2d 795, 800 (5th Cir. 1990) (holding State liable for §1988 attorney's fees where county prosecutor, district attorney, and justice court judge were sued in official capacities as enforcing agents of unconstitutional state statute).

V. CONCLUSION

Before the Court in this case were advertising rules which, whatever their design, had the effect of limiting the commercial speech rights of the lawyer Plaintiffs who wished to advertise without the restrictions, of the media and advertising agency Plaintiffs who would have designed, produced and publicized the advertising, and of public citizens who had the right to hear the messages of the advertising lawyers. The Court recognizes that, in different forums, certain of the same rules that are challenged in the present case have been upheld as permissible, narrow restraints on speech, promulgated to protect substantial governmental interests. See Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94-CV-61, slip op. at 99 (E.D. Tex. Mar. 31, 1995). This Court, however, did not have the benefit of proof offered by Defendants in support of their burden of showing the constitutionality of the new Rules. The Court therefore must strike the new Rules as unconstitutional.

IT IS THEREFORE ADJUDGED AND DECLARED that the Amendments to Rule 7, Information About Legal Services, Mississippi Rules of Professional Conduct, as promulgated by the Supreme Court of Mississippi, (attached hereto as Appendix 1) and made enforceable by the Defendants in this action, are unconstitutional and unenforceable, as applied to Plain

tiffs and others similarly situated, and as the Official Comments to those same Rules indicate the Rules are to be construed and applied.

IT IS FURTHER ORDERED that the Defendants pay all taxable costs and, as a part thereof, all reasonable and necessary attorney's fees and legal expenses as are allowed under 42 U.S.C. §§1983 and 1988, upon compliance by Plaintiffs with Uniform Local Rule 15.

SO ORDERED this the 20th day of June, 1995.

s/s William Barbour, CHIEF JUDGE

psm